

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36077

NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC RAILROAD
COMPANY—PETITION FOR DECLARATORY ORDER

Decided: December 2, 2016

On October 4, 2016, North Coast Railroad Authority (NCRA) and Northwest Pacific Railroad Company (NWPCo) (together Petitioners) filed a petition requesting an emergency declaratory order and preliminary injunctive relief to prevent Sonoma-Marín Area Rail Transit District (SMART) from interfering with freight rail operations over portions of the Northwestern Pacific Railroad Line.¹ (Pet. 2, 4-5, 10-11.) On October 21, 2016, the Board issued an order denying the preliminary injunction. See N. Coast R.R. Auth. v. Sonoma-Marín Area Rail Transit Dist., NOR 42148 (STB served Oct. 21, 2016). On November 3, 2016, the Board directed Petitioners to brief certain issues and provide specific factual information, and directed SMART to reply. See N. Coast R.R. Auth. & N.W. Pac. R.R.—Pet. for Declaratory Order (November 3 Decision), FD 63077 (STB served Nov. 3, 2016).² This decision vacates the reply deadline set by that decision and sets a conference call with the parties to clarify or specify materials that would be responsive to the requests in that decision.

BACKGROUND

The factual background of this matter is set forth in detail in the November 3 Decision, which explained that this case arose out of Petitioners' claim that SMART was using its dispatching function over the Line to deny track warrants and thereby prohibiting NWPCo's movement of freight. November 3 Decision, slip op. at 3. The decision explained that, for the Board to reach a conclusion on the merits of the Petitioners' claims, which raise a number of novel issues, the Board would require further briefing by the parties. Id. at 4. The Board then outlined areas where it required additional factual information to complete the record and further legal argument to address the issues raised, and directed Petitioners to brief certain issues and provide certain information by November 23, 2016, and SMART or other interested parties to

¹ The parties also refer to the Northwestern Pacific Railroad Line as the Northwestern Pacific Line. For purposes of this decision, we will refer to it as the Line.

² In the November 3 Decision, the Board also changed the docket number of the proceeding from NOR 42148 to FD 36077.

reply by December 5, 2016. (Id. at 4-6.) The Board also indicated that the parties could move for an appropriate protective order to protect confidential information. (Id. at 5.)³

On November 23, 2016, pursuant to the procedural schedule, Petitioners submitted their brief addressing the questions presented by the Board in the November 3 Decision. Petitioners indicated that 12 cars carrying liquid petroleum gas (LPG) for which SMART had denied track warrants had been transported to their ultimate destination, that almost all of the railcars loaded with LPG at the Schellville yard had been shipped to their ultimate destinations, and that NWPCo will now be receiving, storing, and staging empty railcars for shipment to refineries for loading and will not be storing loaded LPG tank cars until spring 2017. (Pet’rs Br. at 4-5.)

On November 25, 2016, SMART submitted a request for extension of time so that it may seek discovery from the Petitioners. (SMART Mot. 1, Nov. 25, 2016.) SMART states that Petitioners’ brief did not provide “sufficient detail in the information sought by the” November 3 Decision. (Id. at 3.) It asserts that the “factual information [it seeks] is necessary for the Board to have a complete record on which to decide the issues raised by the . . . Petition for Declaratory Order.” (Id.) SMART also claims that it “cannot adequately respond to the . . . Petition or the [November 3 Decision] without this factual information.” (Id.)⁴

On November 28, 2016, Petitioners replied in opposition to SMART’s motion, asserting that the discovery demands are broad and that an extension would prejudice Petitioners “by extending the time that SMART can block transportation by denying track warrants at times for all goods, and at other times to deny track warrants to certain goods such as LPG.” (Pet’rs Reply 2-3.) In response to SMART’s assertion that the information is not sufficiently detailed, Petitioners claim that they satisfied the Board’s request by providing inbound and outbound waybills and sworn testimony that those waybills are representative waybills for both shippers. (Id. at 3.) In part due to the volume of information SMART requests, Petitioners state that the discovery requests are objectionable. (Id. at 4). Petitioners provide both SMART’s discovery requests, (id. at Ex. A), and their own objections to those discovery requests, (id. at Ex. B).

³ Petitioners filed a motion for protective order on November 23, 2016. SMART filed a motion for an alternative protective order on November 30, 2016. The Board will address these motions in a separate decision.

⁴ On November 23, 2016, the County of Napa (Napa) filed a notice of intent to participate. As part of its notice, Napa raised safety issues related to the 12 LPG loaded tank cars for which NWPCo had been denied track warrants. (Napa Notice 1-2.) On November 28, 2016, the City of American Canyon and American Canyon Fire Protection District (collectively American Canyon), which had earlier filed a notice of intent to participate, filed a motion in support of SMART’s extension request, raising safety concerns about the movement of hazardous materials over the line and SMART’s refusal to issue track warrants, and concluding that good cause exists to extend the procedural schedule to permit discovery. (American Canyon Mot. 2-3.) On December 1, 2016, Petitioners filed in opposition to American Canyon’s motion to extend the procedural schedule. On December 2, 2016, American Canyon replied to Petitioners’ opposition.

On November 30, 2016, SMART submitted a motion to compel discovery from NWPCo. SMART asserts that its “[d]iscovery [r]equests are designed to obtain the factual information necessary for SMART to respond to the” November 3 Decision. (SMART Mot. 2, Dec. 1, 2016.) Specifically, SMART states that it seeks factual information to brief on the question of whether NWPCo’s “storage of loaded LPG tank cars in Schellville constitutes ‘transportation by rail carrier’ and whether the provision prohibiting the storage of hazardous materials in [the Agreement] . . . unreasonably interferes with interstate commerce.” (*Id.*) SMART also asserts that the discovery requests are necessary based on the Petitioners’ arguments that they provide “an ‘integrated’ transportation and storage service at Schellville which constitutes . . . ‘transportation by rail carrier’ and that the provision of the [Agreement] restricting the storage of loaded LPG tank cars at Schellville should be preempted by ICCTA.” (*Id.* at 2-3.)

DISCUSSION AND CONCLUSIONS

As previously noted, the controversies in this case surround the railroads’ common carrier obligation and whether SMART’s actions are preempted by federal law. *See* 49 U.S.C. § 11101; 10501(b); *see also* November 3 Decision, slip op. at 4. The Board’s November 3 Decision outlined a number of requests for the parties to address in their further submissions to the Board in this proceeding. These requests included general evidentiary requests and requests relating to the common carrier obligation and federal preemption. Petitioners provided considerable information in response to those requests. However, their explanations also raised a number of additional factual questions relevant to the novel issues in this proceeding.

As SMART argues, the record still does not contain all the factual information necessary for the Board to decide the issues raised by the petition for declaratory order. For example, questions remain regarding requests 1(a) and 2(b) from the Board’s order. *See* November 3 Decision, slip op. at 4-5. Specifically, it is unclear that the information provided illustrates a typical route, from *origin* to *ultimate destination*, of the LPG tank cars at the Schellville yard, including a *description* of NWPCo’s role in that movement. Additionally, Petitioners’ brief raises questions about the “integrated transport and storage service” it provides, as well as its business relationship with its shippers, Tesoro Refining & Marketing Company, LLC and Valero Marketing Supply Company, and other railroads, such as Union Pacific Railroad Company.

Because there is outstanding factual information necessary to complete the record and to decide the issues raised in this proceeding, the Board will schedule a conference call for all parties to clarify or specify materials that would be responsive to the November 3 Decision and outline the Board’s need for additional factual information brought to light by Petitioners’ brief. The conference call will be limited to the areas where the Board seeks factual information related to the common carrier obligation and federal preemption. The conference call will be held on Thursday, December 8, 2016, at 3:00PM Eastern Time. Specific information regarding the conference call will be communicated to counsel for the parties.

SMART also argues that it should be granted time to serve discovery requests and asks the Board to direct NWPCo to respond to those requests, so that SMART is able to address the issues raised in the November 3 Decision. Because the conference call may address the issues

raised by the discovery motions in this proceeding, the Board will leave the discovery questions open with the possibility of revisiting them following the conference call.

After the conference call, the Board anticipates issuing an order requesting any additional information required to complete the record and establishing a new procedural schedule. Therefore, the Board will vacate the December 5, 2016 deadline for replies. The Board recognizes Petitioners' argument that any delay in the procedural schedule prejudices Petitioners, but not SMART, primarily because of SMART's denial of certain track warrants. (Pet'rs Reply 2-3.) However, following the initial dispute, SMART assured NWPCo that it takes no exception to the transportation by NWPCo of non-hazardous freight. (See SMART Reply 3, Ex. A, Oct. 6, 2016.) Moreover, the 12 loaded LPG tank cars at Lombard and the additional loaded LPG cars stored at Schellville apparently have proceeded to their ultimate destination without incident. (Pet'rs Br. 4-5.) The Board sees no evidence that the SMART has denied or intends to deny track warrants for any freight except loaded LPG tank cars going to storage at the Schellville yard,⁵ which Petitioners do not intend to move until Spring 2017. (Id.) Therefore, the benefit of a brief delay to complete the record outweighs any potential prejudice to Petitioners.

It is ordered:

1. The December 5, 2016 due date for replies is vacated and a revised procedural schedule will be established in a later decision.
2. A conference call with the parties, counsel, and Board staff is scheduled for 3:00PM Eastern Time on Thursday, December 8, 2016.
3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁵ This is not intended to imply any judgment on the merits of the question of whether SMART *is permitted* to deny track warrants for LPG tank cars moving to the Schellville yard.